

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	3:00-cr-00058-HDM-RAM
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
ROBERTO CARLOS RANGEL,)	
)	
Defendant.)	
)	

On March 6, 2014, the defendant filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (#258). The government responded (#264) and defendant replied (#265).

Defendant asserts the 147 month sentence imposed on him July 22, 2008, was based in part on a judicial fact-finding process held unconstitutional by the Supreme Court in *Alleyne v. United States*, 133 S.Ct. 2151, 186 L.Ed 2d 314 (2013). The government contends *Alleyne* is inapplicable to defendant's case.

The court finds defendant's sentence is not affected by the Supreme Court's finding in *Alleyne*. The length of the defendant's sentence was calculated based upon an agreement of the parties and not by the same sort of judicial fact-finding that was implicated in *Alleyne* and its progenitors. Accordingly, the motion is denied.

Procedural History

On April 12, 2000, the grand jury for the District of Nevada returned a multi-count indictment charging the defendant and

1 Humberto Magana Arias with violations of the Controlled Substances
2 Act. Presentence Investigation Report at 3. On April 23, 2001,
3 the defendant pleaded guilty to conspiracy to possess with intent
4 to distribute methamphetamine, in violation of 21 U.S.C. §§ 846,
5 841(a)(1), 841(b)(1)(A)(VIII) as charged in a second superseding
6 indictment. *Id.*

7 On June 17, 2001, while on pretrial release, the defendant
8 removed his transmitter and left his residence. (#69). He was
9 found in violation of his pretrial release conditions and a warrant
10 was issued for his arrest on June 19, 2001. *Id.* He subsequently
11 failed to appear for sentencing on July 30, 2001. (#76). At that
12 time, the court confirmed a no-bail warrant for the arrest of
13 defendant had been issued and remained in effect. *Id.* Law
14 enforcement officials arrested the defendant on his pretrial
15 release indictment on January 11, 2008, approximately six and a
16 half years after he absconded. Presentence Investigation Report at
17 3-4.

18 At a June 17, 2008, status conference, the government and the
19 defendant's counsel advised the court that a plea agreement had
20 been reached, under the terms of which the defendant consented to a
21 sentence of 147 months in exchange for a dismissal of case no.
22 3:01-cr-00120-HDM-RAM, where the defendant was charged with a
23 violation of 18 U.S.C. §§ 3146(a)(1) and (b) - that he did
24 knowingly fail to appear at his sentencing in this case. (#214 at
25 5:16-18). The defendant indicated he understood the recommended
26 sentence at that time. *Id.* The defendant's agreement and consent
27 were memorialized in a written stipulation signed by the defendant
28 on June 30, 2008. In that agreement the defendant agreed to a

1 sentence of 147 months in this case in exchange for a dismissal of
2 3:01-cr-00120-HDM-RAM. (#200).

3 ***Alleyne* is not Applicable**

4 In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme
5 Court determined any fact (other than the fact of a prior
6 conviction) that increases the penalty for a crime beyond the
7 prescribed statutory maximum sentence "is an 'element' that must be
8 submitted to the jury and found beyond a reasonable doubt."

9 *Alleyne* at 2155. In *Alleyne*, the Court extended its analysis in
10 *Apprendi* to facts that increase a mandatory minimum sentence.

11 *Alleyne* is distinguishable from the case before the court.
12 The defendant in *Alleyne* was convicted of using or carrying a
13 firearm during a crime of violence, in violation of 18 U.S.C. §
14 924(c). *Id.* at 2155-2156. Section 924(c) provides for a five-year
15 mandatory minimum sentence for any violation, but the minimum term
16 is increased to seven years if the firearm was brandished, and to
17 ten years if the firearm was discharged. See 18 U.S.C. §
18 924(c) (1) (A) (i)-(iii).

19 The jury in *Alleyne* made no finding as to whether the firearm
20 he used was brandished, and *Alleyne* argued that imposition of the
21 seven-year mandatory minimum sentence based on a finding by the
22 district court of brandishing violated his Sixth Amendment right to
23 a jury trial. *Alleyne* at 2156. The Supreme Court agreed, finding
24 "[m]andatory minimum sentences increase the penalty for a crime"
25 and "any fact that increases the mandatory minimum is an 'element'
26 that must be submitted to the jury." *Id.* At 2155.

27 Thus, in *Alleyne*, the district court added an element that had
28 not been considered by a jury. Here, under the terms of the plea

1 agreement, the defendant expressly consented to the enhancement in
2 exchange for the government dismissing the charge of failure to
3 appear. The defendant faced the possible consequence of
4 imprisonment of not more than five years in case no. 3:01-cr-00120-
5 HDM-RAM. He freely and voluntarily requested and consented to the
6 imposition of a sentence of 147 months in this case to avoid an
7 additional 60 month sentence on the failure to appear charge, as
8 evidenced by his signed plea agreement on which he was fully
9 canvassed by the court at the hearing on April 23, 2001. *See supra*
10 at 2:18-3:2. *See also* #227.

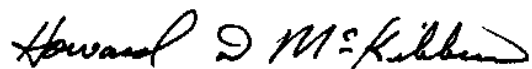
11 In addition, the defendant freely and voluntarily waived his
12 right to appeal. The parties incorporated the waiver element of
13 the initial plea agreement. (#221 at 9:22-10:14). That provision
14 holds that the defendant "knowingly and expressly waives his right
15 to appeal any sentence to be imposed that is within the applicable
16 sentencing guideline range contemplated by the parties into this
17 agreement" (#61 at 5). The court imposed the sentence
18 agreed to by the parties and therefore did not impose a sentence
19 beyond the applicable sentencing guideline range.

20 **Conclusion**

21 Accordingly, and based on the foregoing, the defendant's
22 motion to vacate, set aside, or correct sentence pursuant to 28
23 U.S.C. § 2255 is hereby **DENIED**.

24 **IT IS SO ORDERED.**

25 DATED: This 15th day of September, 2014.

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27

28 UNITED STATES DISTRICT JUDGE